VIA ELECTRONIC FILING

March 3, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *IB Docket Nos. 02-324, 96-261*

Dear Ms. Dortch,

Vodafone Americas, Inc., on behalf of itself and Vodafone Group Services Limited (jointly, "Vodafone"), submits this letter in response to recent claims by U.S. interexchange carriers ("IXCs") urging the Commission to impose a benchmarks regime on foreign mobile termination rates ("MTRs"). AT&T Corp. ("AT&T") and MCI argue that mobile termination rates are subject to the international settlement rate benchmarks caps adopted by the Commission in 1997.[1] They further argue that the Commission must adopt a new, separate benchmarks regime for foreign mobile termination rates. As discussed below, these proposals are without merit. Vodafone submits that the Commission may wish to keep apprised of foreign MTRs, take action if US consumers become subject to discriminatory MTRs, and if issues arise, engage individual countries on a bilateral basis to address specific concerns in connection with MTRs. A further proceeding, however, would be unwise and ineffectual.

The Benchmarks Policy Does Not Include Foreign Mobile Termination Rates.

In adopting the *Benchmarks Order* in 1997, the Commission gave no consideration to calls to mobiles or mobile termination charges or costs.[2] Rather, the Commission focused on the

1 *See* Letter to Marlene H. Dortch, Secretary, FCC, from Douglas W. Schoenberger, AT&T, in IB Docket Nos. 02-324, 96-261 (Feb. 24, 2004); Letter to Marlene H. Dortch, Secretary, FCC, from Ruth M. Milkman, Counsel to MCI, in IB Docket Nos. 02-324, 96-261 (Feb. 26, 2004).

2 *See International Settlement Rates,* IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19806 (1997) ("*Benchmarks Order*"), *recon.,* 14 FCC Rcd 9256 (1999), *aff'd sub nom. Cable & Wireless P.L.C. v FCC,* 166 F.3d 1224 (D.C. Cir. 1999).

wireline facilities used to terminate U.S. international traffic, and the benchmarks established in that order were based exclusively on an analysis of foreign tariffs for wireline operations. In particular, the Commission set the benchmarks rates by using a "tariffed components price" ("TCP") methodology consisting of three components: international facilities; international gateways; and national extension. As the Commission explained, the national extension component consists of three parts: "national exchanges," "national transmission," and "local loop facilities."[3] The description evidences the Commission's exclusive focus on wireline facilities.

In contrast, the *Benchmarks Order* did not include any discussion of mobile services. Indeed, the only reference to mobile services is an acknowledgement, in a footnote, that a foreign carrier had commented that the "TCP methodology does not consider 'network architecture and wireless telephone call charge.'"[4] The Commission did not dispute the carrier's point or consider the issue further. Thus, there is no evidence that the Commission intended the benchmarks to include MTRs. Indeed, the evidence is to the contrary.

AT&T's efforts to suggest otherwise are unavailing. First, AT&T cites to a handful of general statements in the *Benchmarks Order* and the *Benchmarks Reconsideration* that appear in introductory or closing passages that do not establish the scope or applicability of the benchmarks regime.[5] AT&T also cites to subsequent International Bureau enforcement actions and waivers of the International Settlements Policy ("ISP"), but these decisions fail to demonstrate any consideration, let alone conclusion, regarding the applicability of benchmarks caps to mobile termination. AT&T references further a 1998 letter from the then-chief of the International Bureau, but that letter makes clear that overseas termination charges may be higher than the benchmarks rate so long as they are "cost-justified." AT&T's own mobile benchmarks proposal effectively acknowledges that mobile termination costs are higher than fixed line termination costs. Finally, AT&T cites a 2003 decision that addressed whipsawing in the context of the Commission's overarching ISP, but made no finding that the benchmarks apply to U.S. international calls terminated on foreign mobile networks. In short, AT&T provides no evidence that the Commission intended to extend the benchmarks policy to mobile termination rates.

Given the benchmarks policy's exclusive focus on wireline national extension facilities, it would be arbitrary and capricious for the Commission now to extend the benchmarks regime to cover mobile termination charges. *See PLMRS Narrowband Corp. v. FCC,* 182 F.3d 995, 999

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3 *Benchmarks Order*, 12 FCC Rcd at 19830. An appendix to the decision describing the TCP methodology reveals that the Commission considered the costs of termination on the dominant carrier's wireline network. *Id.* at Appendix E, E10-E12.

4 *Id.* at 19834 n.85.

5 *See id.* at 19807 ("benchmarks ... govern the international settlement rates that U.S. carriers may pay foreign carriers to terminate international traffic originating in the United States."); *id.* at 19951("the rules we adopt here apply [only] to the settlement rates that carriers subject to our jurisdiction must pay for termination of U.S.-originated traffic."); *Benchmarks Reconsideration Order,* 14 FCC Rcd at 9256 ("we affirm the Commission's previous finding that it possesses authority to regulate international settlement payments by U.S. carriers for the termination of traffic originating in the United States.").

(D.C. Cir. 1999) (noting that Commission action is arbitrary and capricious if it does not demonstrate that "it examined the relevant information and gave a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."). Further, such a ruling at this stage would constitute an unlawful "change [in] the rules of the game," going far beyond a permissible clarification of existing policy. *Sprint Corp. v. FCC,* 315 F.3d 369, 374 (D.C. Cir. 2003). As a result, the Commission should reject the IXCs' benchmarks policy claim.

US Consideration of "Mobile Benchmarks" Is Unwarranted, As Is Any Initiative with a Multilateral Scope of Review.

AT&T and MCI also assert that the Commission should adopt a new, separate benchmarks regime specifically for mobile termination rates. As Vodafone previously demonstrated, a further MTR proceeding with a multilateral impact would be unwise and ineffectual.

First, although 22% of US-originated traffic was terminated on foreign mobiles in 2001, approximately 30% of that traffic was terminated in Canada and Mexico, which employ Receiving Party Pays regimes and thus do not have MTRs.[6] The rest of US-originated traffic terminating on overseas mobiles is largely terminated at regulated mobile termination rates. Many foreign regulators have reduced MTRs and are engaged in proceedings which are expected to lower MTRs further. Notably, US consumers are not subject to discriminatory mobile termination rates, and US consumers are benefiting from overseas regulatory actions to reduce MTRs. Indeed, the interests of overseas consumers and regulators are aligned with their US counterparts, in contrast to the 1997 *Benchmarks* proceeding. Commission intervention, particularly action that is perceived as extraterritorial, could well interfere in the process of foreign regulators' examination of mobile termination issues.[7]

A "mobile benchmarks" policy, moreover, would be ineffectual. By way of background, international settlements and MTRs are fundamentally different. Settlements involve direct arrangements between foreign correspondents with payments based on the net outflow of traffic. In contrast, US international carriers and overseas mobile carriers do not exchange settlements based on the relative nature of inbound-outbound traffic – indeed, there is no privity of contract relationship between the two entities.

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6 Telegeography 2003 at 5.

7 *See* European Union Comments at 3 ("oppos[ing] the idea to impose unilaterally regulatory obligations on mobile termination of international services, as explored by the FCC in its NPRM" and noting that such action would "undermine[]" the understanding of differing regulatory frameworks (*e.g.,* Calling Party Pays vs. Receiving Party Pays)).

As Royal KPN NV noted in its reply comments, a new benchmarks rate for mobile termination would have "little direct impact" on foreign MTRs and would "be far more likely to harm, rather than help, U.S. consumers and carriers."[8] If the Commission were to adopt mobile benchmarks, foreign fixed-line carriers would be placed in a price squeeze, forced to pay the MTR but not permitted to receive full compensation from the U.S. carrier. In this circumstance, it is likely that foreign carriers would find it more economical to refuse to carry US traffic bound for mobile networks, effectively disrupting service for US consumers.[9] In the MTR context, US carriers would not have leverage over their foreign counterpart to compel carriage, as they did in connection with the *Benchmarks* proceeding. A proceeding to consider mobile benchmarks, therefore, would be ineffectual and counterproductive.

Instead, the Commission should monitor the marketplace and take appropriate action if US consumers are subject to discriminatory MTRs. Where overseas regulators are reviewing issues associated MTRs, these efforts should continue free from Commission oversight. If MTR issues arise in particular countries, the Commission should engage in bilateral discussions to address its concerns.

Please contact the undersigned if you have any questions.

Respectfully submitted,

/s/

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8 Royal KPN NV Reply Comments at 2.

9 *Id.* at 8-9; *see also* Cable & Wireless Comments at 19 ("In contrast to the situation with the original benchmarks order, in which international operators faced losing their entire revenue stream associated with U.S. inbound traffic in the case of non-compliance, international operators would have the option of simply declining to carry any traffic destined for the foreign mobile network.").